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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1932

No. 729

DANIEL W. O'DONOGHUE,

vs.

THE UNITED STATES.

No. 730

WILLIAM HITZ,

vs.

THE UNITED STATES.

PLAINTIFFS' BRIEF.

JOHN W. DAVIS,
GEORGE E. HAMILTON,
JOHN S. FLANNERY,
DANIEL W. O'DONOGHUE, JR.,
Counsel for Plaintiffs.

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Short Statement.

The above cases are here on certificate from the Court of Claims. Suits were instituted in that Court by Daniel W. O'Donoghue, an Associate Justice of the Supreme Court of the District of Columbia, and by

William Hitz, an Associate Justice of the Court of Appeals of said District, to recover deductions of 10 per cent and 20 per cent, respectively, made from their official salaries for the months of July to December, inclusive, 1932, pursuant to a ruling of the Comptroller General of the United States based upon the Act of Congress approved June 30, 1932, making appropriation for the Legislative Branch of the Government for the fiscal year ending June 30, 1933 (47 Stat. 382, 399), in which was incorporated certain provisions known as the Economy Act.

Each of the plaintiffs was appointed and commissioned to hold his office during good behavior and at the time of his appointment, under the provisions of an Act of Congress approved December 13, 1926, "to fix the salary of certain Judges of the United States" (44 Stat. 919-920) the salary of an Associate Justice of the Supreme Court of the District of Columbia was permanently fixed at the rate of $10,000 per annum and that of an Associate Justice of the Court of Appeals of said District at $12,500 per annum.

By the Act "making appropriations for the Government of the District of Columbia and other activities chargeable in whole or in part against the revenues of such District for the fiscal year ending June 30, 1933, and for other purposes," approved June 29, 1932 (47 Stat. 343, 368), appropriation was made by the Congress to pay the full compensation of the plaintiffs and their Associate Justices.

These salaries are payable out of the Treasury of the United States and 60 per cent thereof is charged

against the revenues of the District of Columbia (Code D. C., 1929, Section 35, title 18).

From the date of their respective appointments and qualifications, each of the plaintiffs was paid the salary of his office to and including June 30, 1932. On or about July 13, 1932, the Comptroller General of the United States made a ruling in which he held, among other things, that the aforesaid Courts were "legislative" and not "constitutional" Courts entitled to the protection of Section 1, Article III, of the Constitution, and that the compensation of Justices thereof could be diminished.

Although willing to make a voluntary contribution, in the existing emergency, of as much of their time, money and services as they could afford, plaintiffs could not admit the power of Congress, under the Constitution, to compel or exact an enforced assessment of any amount whatsoever by diminishing the compensation to which they were entitled during their continuance in office, and in their petitions stated that while reluctant to institute a suit which might result in personal benefit to themselves, they felt it a duty to the Court, to the Bar, to the citizens of the District of Columbia and to the people of the United States to have the status of the Courts of the District of Columbia, as important, national and local tribunals, defined and settled.

Questions Certified.

The Court of Claims requests that it be given appropriate instructions for its guidance upon the fol-

lowing questions in both cases, which we have combined for convenience:

I. Does Section 1, Article III, of the Constitution of the United States apply to the Court of Appeals and Supreme Court of the District of Columbia and forbid a reduction of the compensation of the Justices thereof during their continuance in office?

II. Can the compensation of a Justice of the Court of Appeals or of the Supreme Court of the District of Columbia be lawfully diminished during his continuance in office?

Constitutional Provisions.

The following provisions of the Constitution are involved:

> Article I, Section 8. "The Congress shall have power * * *
>
> To constitute tribunals inferior to the Supreme Court;
>
> To exercise exclusive legislation in all cases whatsoever, over such District (not exceeding ten miles square) as may, by cession of particular States, and the acceptance of Congress, become the seat of the Government of the United States."
>
> Article III, Section 1. "The judicial power of the United States shall be vested in one Supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the Supreme and inferior Courts, shall hold their offices during good behavior, and shall, at stated times, receive for their services, a compensation, which shall not be diminished during their continuance in office."

The Statute.

The statute relied upon by the Comptroller General is the Act of Congress making appropriations for the Legislative Branch of the Government for the fiscal year ending June 30, 1933, approved June 30, 1932, Part II, Sections 105-107. The applicable provisions are the following:

> "Sec. 105. During the fiscal year ending June 30, 1933—
>
> "(*d*) In the case of the following persons the rate of compensation is reduced as follows: If more than $1,000 per annum but less than $10,000 per annum, 8⅓ per centum; if $10,000 per annum or more, but less than $12,000 per annum, 10 per centum; if $12,000 per annum or more, but less than $15,000 per annum, 12 per centum; if $15,000 per annum or more, but less than $20,000 per annum, 15 per centum; if $20,000 per annum or more, 20 per centum."
>
> *"Retired Pay"*
>
> "Sec. 106. During the fiscal year ending June 30, 1933, the retired pay of all judges (except judges whose compensation may not, under the Constitution, be diminished during their continuance in office) and the retired pay of all commissioned and other personnel (except enlisted) of the Army, Navy, Marine Corps, Coast Guard, Coast and Geodetic Survey, Lighthouse Service, and the Public Health Service shall be reduced as follows: If more than $1,000 per annum but less than $10,000 per annum, 8⅓ per centum; if $10,000 per annum or more, but less than $12,000, 10 per centum; if $12,000 per an-

num or more, but less than $15,000 per annum, 12 per centum; if $15,000 per annum or more, but less than $20,000, 15 per centum; if $20,000 per annum or more, 20 per centum. This section shall not operate so as to reduce any rate of retired pay to less than $1,000 per annum."

"Special Salary Reductions"

"Sec. 107. (*a*) During the fiscal year ending June 30, 1933—

"(5) the salaries and retired pay of all judges (except judges whose compensation may not, under the Constitution, be diminished during their continuance in office), if such salaries or retired pay are at a rate exceeding $10,000 per annum, shall be at the rate of $10,000 per annum."

Jurisdiction of the Court of Claims.

This question, raised by the demurrer filed by counsel for the Government, is not a part of the certificate. The jurisdiction of the Court below is challenged upon the ground that these are claims against the District of Columbia and not against the United States. Plaintiffs below had no contractual relations with the District of Columbia and no claim upon that Municipal corporation for compensation. They were appointed, commissioned, qualified and are serving as Justices of Courts of the United States. By the Act of December 13, 1926, *supra*, their salaries were fixed as "Judges of the United States". Under the statutes creating the courts of the District of Columbia and the decisions of this Court defining their status, the courts over which they preside always have been regarded as

United States courts. Funds appropriated to pay the salaries of said justices are now in the Treasury of the United States, can be drawn therefrom only by checks of the disbursing officer of the Department of Justice and any unexpended balance of the appropriation, the Economy Act provides, must "be impounded and returned to the Treasury" (Act of June 30, 1932, *supra*). The obligation to pay these judicial salaries is the obligation of the United States (*James* v. *United States*, 202 U. S. 401). The Congress may discharge this obligation by including the necessary amount in the District of Columbia Appropriation Bill (Act of June 29, 1932, *supra*) or any other appropriation bill, and apportion or divide the amount appropriated between the United States and the District of Columbia as it sees fit. The method adopted for the discharge of a debt does not determine the incidence of the obligation.

Furthermore, the petition clearly sets forth a claim founded upon the Constitution of the United States and laws of Congress of which the Court of Claims is expressly given jurisdiction by Section 145 of the Judicial Code (U. S. C. Sec. 250).

LEGISLATIVE HISTORY OF THE DISTRICT OF COLUMBIA COURTS.

The Supreme Court.

This Court was created by the Act of March 3, 1863 (12 Stat. 762), and by the third section of that act, the court and the judges thereof were given the same powers and jurisdiction possessed and exercised by the old Circuit Court of the District of Columbia.

The Circuit Court was established by the Act of February 27, 1801 (2 Stat. 103), and consisted of a chief justice and two assistant judges appointed to hold office during good behavior and was vested with all of the powers given to the circuit courts of the United States and the judges thereof.

When this Act of February 27, 1801, was passed the law then in force which vested the judicial power in the circuit courts of the United States was the Act of February 13, 1801 (2 Stat. 89), the eleventh section of which made the following grant of jurisdiction:

> "*And be it further enacted,* That the said circuit courts, respectively, shall have the cognizance of all crimes and offences cognizable under the authority of the United States, and committed within their respective districts, or upon the high seas; and, also, of all cases in law or equity, arising under the constitution and laws of the United States, and treaties made, or which shall be made under their authority; and, also, of all actions or suits of a civil nature, at common law, or in equity, where the United States shall be plaintiffs or complainants; and, also, of all seizures on land or water, and all penalties and forfeitures, made, arising, or accruing, under the laws of the United States; which cognizance of all penalties and forfeitures shall be exclusively of the state courts, in the said circuit courts, where the offence by which the penalty or forfeiture is incurred, shall have been committed within fifty miles of the place of holding the said courts; and, also, of all actions or suits, matters or things, cognizable by the jurdicial authority of

the United States, under and by virtue of the constitution thereof, where the matter in dispute shall amount to four hundred dollars, and where original jurisdiction is not given by the constitution of the United States to the Supreme Court thereof, or exclusive jurisdiction, by law, to the district courts of the United States: *Provided, always,* That, in all cases where the title, or bounds of land shall come into question, the jurisdiction of the said circuit courts shall not be restrained by reason of the value of the land in dispute."

The Act of February 13, 1801, creating the circuit courts of the United States incorporated a new judicial district for the Territory of Columbia formed by cession from the States of Maryland and Virginia and contiguous counties of Virginia and Maryland surrounding that territory, Section 21 provides:

"And a new district shall be established in the districts of Maryland and Virginia, to consist of the Territory of Columbia, of all that part of the district of Maryland which lies west and south-west of the river Patuxent and of the western branch thereof, and south of the line which divides the county of Montgomery, in the last-mentioned district, from the county of Frederick; and of a line to be drawn from the termination of the last-mentioned line, a north-east course, to the western branch of the Patuxent; and of all that part of the district of Virginia, which lies north of the river Rappahannock, and east of the line which divides the counties of Fauquier and Loudon, in the last-mentioned district, from the counties of Fair-

> fax, Prince William, and Stafford; which new district shall be called the District of Potomac, and a district court in and for the same shall be holden at Alexandria, by the district judge of the district of Maryland, on the first Tuesday in April and the first Tuesday in October, in each and every year."

The Act of Congress of April 2, 1816, provided for the removal of causes "from the Circuit Court of the United States for the District of Columbia to the Supreme Court of the United States by appeal or writ of error," etc.

From the time of their organization, the Supreme Court of the District of Columbia and its predecessor, the old Circuit Court, have been designated in various Acts of Congress as "Courts of the United States" and the judges thereof have always been appointed by the President with the consent of the Senate for good behavior and have always been regarded as and had the same powers as the other Federal judges.

By Act of March 3, 1839 (5 Stat. 354), the chief justice of the District Court of the United States for the District of Columbia was given the right to review the decisions of the Commissioner of Patents.

By the Act of August 19, 1841 (5 Stat. 440), the Circuit Court was given jurisdiction in bankruptcy cases. By the Act of March 3, 1845 (5 Stat. 732), the Circuit Court was given jurisdiction over offenses against the franking privilege.

The Act of March 3, 1863 (12 Stat. 762), created the Supreme Court of the District of Columbia, with

one chief justice and three associate justices appointed by the President by and with the consent of the Senate to hold office during good behavior, with the jurisdiction formerly possessed by the Circuit Court, and requiring one justice of the new court to hold the District Court of the United States.

The Supreme Court was reorganized upon the passage of the Code of Law for the District of Columbia March 3, 1901, and the following sections expressly define the jurisdiction and powers of the justices as follows:

> "Sec. 61. *Jurisdiction.*—The said court shall possess the same powers and exercise the same jurisdiction as the circuit and district courts of the United States, and shall be deemed a court of the United States, and shall also have and exercise all the jurisdiction possessed and exercised by the Supreme Court of the District of Columbia *under the Act of Congress approved March third, eighteen hundred and sixty-three, creating that court, and* at the date of the passage of this code."
>
> "Sec. 62. *Powers of Justices.*—The justices of said court, in addition to the powers and jurisdiction possessed and exercised by them as such, *under said Act of March third, eighteen hundred and sixty-three, and at the date of the adoption of this code,* shall severally possess the powers and exercise the jurisdiction possessed and exercised by the judges of the circuit and district courts of the United States."
>
> * * * * * * *
>
> "Sec. 64. The special terms of said court shall be known, respectively, as the circuit court, the

equity court, the criminal court, the probate court, and the district court of the United States."

* * * * * * *

"Sec. 84. *The District Court.*—The said district court shall have and exercise the same powers and jurisdiction as the *other district courts* of the United States, and such further special jurisdiction as may from time to time be conferred by Congress, and of all proceedings instituted in exercise of the right of eminent domain."

The recent amendment to the War Minerals Relief Act, approved February 13, 1929 (45 Stat. 1166, Sec. 3), provides:

"Jurisdiction is hereby conferred upon the Supreme Court of the District of Columbia, *as a district court of the United States,* to hear and determine all such suits and enter all orders, judgments and decrees therein, * * *" (i. e., suits to review the final decision of the Secretary of the Interior upon questions of law).

And in *Swift & Co.* v. *United States* (276 U. S. 311), Justice Brandeis said:

"Suits in equity under Revised Statutes, Sec. 4921, to enjoin patent enfringements, like suits in equity under the Anti-Trust Acts, are entertained by the Supreme Court of the District *solely by virtue of its general powers as a district court of the United States.*"

By Act of Congress approved June 19, 1930 (46 Stat. 785), the number of justices was increased and

the court is now composed of a chief justice and eight associate justices, all appointed for good behavior and receiving the same compensation as Federal District judges.

Court of Appeals.

The Court of Appeals of the District of Columbia was established by the Act of February 9, 1893 (27 Stat. 434), and upon the adoption of the D. C. Code in 1901, it provided:

> Sec. 221. *Constitution.*—The Court of Appeals of said district shall continue as at present organized, and shall consist of one chief justice and two associate justices, who shall be appointed by the President, by and with the advice and consent of the Senate, and shall hold office during good behavior."

From time to time Congress greatly increased the jurisdiction of the court by special statutes relating to national matters, among which are the following:

Act of July 28, 1916 (39 Stat. 424; U. S. Code 1271, Par. 576), allowing appeals from Post Office Department in certain cases.

Amendment to Judicial Code February 13, 1925 (43 Stat. 936), regulating right of appellate courts to enforce, set aside or modify orders of Federal Trade Commission, Federal Reserve Board, Interstate Commerce Commission, etc., and also giving such courts jurisdiction in bankruptcy cases.

Act of February 26, 1926 (44 Stat. 109), authorizing appeals from Board of Tax Appeals.

Act of February 23, 1927, authorizing appeals from Radio Commission.

By Act of Congress approved June 19, 1930 (46 Stat. 785), the number of justices was increased to five and the court is now composed of a chief justice and four associate justices, all appointed for good behavior, receiving the same compensation as justices of the Federal circuit courts of appeal.

ARGUMENT.

I.

The Courts of the District of Columbia Are Constitutional Courts.

In *Downes* v. *Bidwell* (182 U. S. 244, 261), this Court said:

> "This District (District of Columbia) has been a part of the States of Maryland and Virginia. It had been subject to the Constitution, and was a part of the United States. The Constitution had attached to it irrevocably. There are steps which can never be taken backward. The tie that bound the States of Maryland and Virginia to the Constitution could not be dissolved, without at least the consent of the Federal and State Governments to a formal separation. The mere cession of the District of Columbia to the Federal Government relinquished the authority of the States, but it did not take it out of the United States or from under the *ægis* of the Constitution. Neither party had ever consented to that construction of the cession. If, before the District was set off, Congress had passed an unconstitutional act, affecting its inhabitants, it would have been void; in other words, Congress could not do indirectly by carv-

> ing out the District what it could not do directly. The District still remained a part of the United States, protected by the Constitution. Indeed, it would have been a fanciful construction to hold that territory which had been once a part of the United States, ceased to be such by being ceded directly to the Federal Government."

When the District of Columbia was established by the Act of July 16, 1790, the seat of the National Government removed thereto and the circuit courts for the District of Columbia created by Congress, they became vested with all of the judicial power under Article III, and as held in *Kendall* v. *United States* (12 Pet. 524), they were given not only the same powers exercisable by other circuit courts of the United States but also certain additional and further powers under the Constitution which the latter courts did not possess.

Aside from the provisions of the District of Columbia Code, *supra*, it has been held repeatedly that the Supreme Court of the District of Columbia is a Court of the United States.

Embry v. *Palmer*, 107 U. S. 3;
Callan v. *Wilson*, 127 U. S. 540;
Benson v. *Henkle*, 198 U. S. 1;
James v. *United States*, 202 U. S. 407-8;
Cross v. *U. S.*, 145 U. S. 571, 576 (Fuller, C. J.);
Moss v. *U. S.*, 23 App. D. C. 475, 481, 482 (Alvey, C. J.).

Whether the courts of the District of Columbia were established under the power given Congress by Arti-

cle I, Section 8, "to constitute tribunals inferior to the Supreme Court" or "to exercise exclusive legislation in all cases whatsoever over such District, etc.," or under Article III, Section 1—"the judicial power of the United States shall be vested in one Supreme Court and in such inferior courts as the Congress may from time to time ordain and establish"—it cannot be denied that they are tribunals inferior to the Supreme Court of the United States and repositories of the judicial power under Article III of the Constitution. They are a part of the Federal Judicial System, as this Court said in *Federal Trade Commission* v. *Klessner* (274 U. S. at p. 145).

The Supreme Court and Court of Appeals of the District of Columbia possess (1) the jurisdiction appertaining to all of the other Federal Courts of the United States which grows out of the exercise of the judicial power granted in Article III of the Constitution; (2) an extensive jurisdiction involving matters of substantive law, controversies arising and crimes committed in the District of Columbia similar to that exercised by the Courts of the several States, and also special administrative supervision over certain bodies like the Utility Commission which cannot be conferred upon the other Federal Courts of the United States and finds its source in Article I, Section 8, of the Constitution, and (3) the novel and peculiar jurisdiction which has been conferred upon them from time to time over controversies which are national in character, origin and scope and which have no relation to or connection with the District of Columbia other than

the fact that the executive and legislative branches of the Government are located in and perform their important functions at the Capital of the Nation.

This latter very important jurisdiction peculiar to the courts of this district and not possessed by any other Federal courts of the United States and, of course, by no State tribunal, originates in other powers delegated to the United States by the several States, such as the power to regulate commerce, grant patents and copyrights, establish post offices and post roads, protect the customs and revenue, to borrow and coin money, to lay and collect taxes, establish uniform naturalization and bankruptcy laws, punish felonies committed on the high seas and offenses against the law of nations, to declare war and support the Army and Navy, etc. This very important national jurisdiction might be conferred by Congress upon or divided with the other Federal courts, over which Congress has no legislative power, instead of being localized in the District of Columbia for the convenience of the National Government. By the Act of February 13, 1925, *supra,* some of the appellate jurisdiction in these national matters was given to the Circuit Courts of Appeal.

None of this extraordinary national jurisdiction has any relation to the District of Columbia as a municipality. All relates to the National Government and may be exercisable anywhere in the United States. The test is the character of the jurisdiction granted—not the locality of its exercise.

An examination of any volume of the decisions of the Court of Appeals will show the national character of this unusual jurisdiction—

Suits to prevent deportation of aliens;
Questions arising under the provisions of the Transportation Act;
Mandamus proceedings growing out of Indian treaties;
Equity proceedings involving patents to public lands;
Suits to prevent the enforcement of the postal laws and regulations;
Suits to compel the Federal Power Commission to vacate licenses for lands in California;
Actions affecting the Civil Service Commission;
Suits against the Alien Property Custodian to recover the property of a Philippine partnership;
Injunctions against the Federal Trade Commission;
Suits to determine title to patented school lands in California;
Appeals from the Board of Tax Appeals involving deficiency assessments for income taxes throughout the United States;
Mandamus proceedings under the War Veterans Act;
Injunction proceedings to prevent the cancellation of rights of way in connection with irrigation projects in Western States;
Suits involving the sale of the vessel of an enemy corporation;
Injunction proceedings to restrain cancellation of oil leases in Oklahoma, and oil and gas permits in California;
Actions against the Secretary of State to compel the admission of aliens and against the Secre-

tary of the Interior to compel the enrollment of Indians;
Appeals under the Radio Commission Act;
Suits under the Federal Anti-Trust Law, etc.

This blending of jurisdiction, local or municipal, with Federal or National, under the delegated powers conferred upon Congress has resulted in the courts of the District of Columbia receiving a jurisdiction which is unique, broader, and more difficult to administer than that possessed by any courts, Federal or State, in the whole United States.

The granting to the courts of the District of Columbia of an extensive jurisdiction in purely national matters establishes their status as courts of the United States and their exercise of the judicial power under Article III of the Constitution.

There is a vast distinction between jurisdiction and judicial power. The former may be granted, qualified or taken away at the will of Congress. Congress has frequently increased and diminished the appellate jurisdiction of this Court and created and abolished inferior courts. But after having created an inferior court of the United States and defined the subjects over which it would have jurisdiction, Congress cannot limit the exercise of the judicial power because that comes directly from the Constitution and is not derived from Congress.

As Mr. Justice Story points out in *Martin* v. *Hunter's Lessee*, 1 Wheat. 305, 328, Congress in creating these inferior courts and vesting them with judicial power was performing an imperative duty. He says:

"The language of the article is manifestly designed to be mandatory upon the legislature. Its obligatory force is so imperative that Congress could not, without a violation of its duty, have refused to carry it into operation. The judicial power of the United States *shall* be vested (not *may* be vested) in one Supreme Court, and in such inferior courts as Congress may, from time to time, ordain and establish. Could Congress have lawfully refused to create a Supreme Court, or to vest in it the constitutional jurisdiction? * * * If, then, it is the duty of Congress to vest the judicial power of the United States, it is a duty to vest the whole judicial power. The language, if imperative as to one part, is imperative as to all. If it were otherwise, this anomaly would exist, that Congress might successively refuse to vest the jurisdiction in any one class of cases enumerated in the Constitution, and thereby defeat the jurisdiction as to all; for the Constitution has not singled out any class on which Congress is bound to act in preference to others.

* * * * * * *

"It would seem, therefore, to follow that Congress is bound to create some inferior courts, in which to vest all that jurisdiction which, under the Constitution, is exclusively vested in the United States, and of which the Supreme Court can not take original cognizance. They might establish one or more inferior courts; they might parcel out the jurisdiction among such courts, from time to time at their own pleasure. But the whole judicial power of the United States

> should be, at all times, vested either in an original or appellate form, in some courts created under its authority."

Chief Justice Hughes, in his "The Supreme Court of the United States" (p. 133), quotes the following passage from the decision of Mr. Justice Brewer in *Kansas* v. *Colorado* (206 U. S. 46), on the subject of the judicial power:

> "The judicial power of a nation extends to all controversies justiciable in their nature, and the parties to which or the property involved in which may be reached by judicial process, and when the judicial power of the United States was vested in the Supreme and other courts all the judicial power which the nation was capable of exercising was vested in those tribunals."

Nor can the fact that Congress has assigned to the courts of the District of Columbia certain administrative functions which cannot be given to the other Federal courts of the United States change their character from judicial to legislative tribunals.

In *Postum Cereal Company* v. *California Fig Nut Company* (272 U. S. 693, 700), it is said that while Congress "may vest courts of the District with administrative or legislative functions which are not properly judicial, it may not do so with this [the Supreme] Court or any Federal court established under Article III of the Constitution."

Doubtless what it was sought to demonstrate was that Congress could not impose administrative or legislative functions on this Court or upon those Federal courts established *exclusively* under said Article III.

Again in *United States* v. *Duell* (172 U. S. 576, 582-3), it is shown that Congress has exercised its constitutional power to promote the progress of science and useful arts by providing such instrumentalities as will be best calculated to effect this object and since 1790 has varied these instrumentalities from time to time and "since 1870 has asserted the power to avail istelf of the courts of the District of Columbia in that connection." It cannot be contended that this power has any relation to the government of the District of Columbia or was granted to our local courts under the power of exclusive legislation for said District.

This leads to a discussion of the cases in which the status of the District of Columbia courts has been passed upon.

James v. *United States* (38 Ct. Cls. 615; 202 U. S. 401).

The only case in which it was directly decided that the courts of the District of Columbia are inferior courts of the United States under Article III of the Constitution was *James* v. *United States* (38 Ct. Cls. 615; 202 U. S. 401). In this case, the Court of Claims, in an exhaustive opinion by Judge Howry, traced the history of the Supreme Court of the District of Columbia to its constitutional source. The question there involved was a claim for retired pay by the widow of Justice James of the Supreme Court of the District of Columbia and upon appeal this court held that the case was covered by the statute and it was unnecessary to decide the question whether the court itself was an inferior court under Section 1, Article III. The opinion

of Judge Howry cites the cases in this court which differentiate the temporary territorial courts created under Section 3, Article IV, from the permanent tribunals established for the District of Columbia under Section 1, Article III, and says:

> "The legislation of Congress from the beginning of the Government to the present time is largely in keeping with the view that Congress have legislated upon the theory that the courts of the District of Columbia are permanent tribunals capable of receiving some part of the judicial power which can be conferred on courts in the District of Columbia as well as on courts of the United States in the States.
>
> "The judiciary act of 1789 included the area which later formed the District of Columbia (1 Stat., L. 73).
>
> "When by the act of February 13, 1801 (2 Stat., L. 89), Congress passed an act to provide for the more convenient organization of the courts of the United States, the District of Columbia was included within a Federal district created by the act. By the act of February 27, 1801 (2 Stat. 1, 103), entitled 'An act concerning the District of Columbia,' the laws then in force in the State of Virginia and in the State of Maryland were continued in force in that part of the District which had been ceded by those States. A separate circuit court for the District was made, in effect with all the powers of circuit courts and with judges of the same kind of tenure as provided for the court of the circuit from which the District was omitted. The District of Columbia was thus to all intents and purposes segregated as a single circuit from

> the other circuits and stood alone as a circuit court *sui generis*. It possessed most of the powers belonging to circuit and district courts of the United States and nearly all the jurisdiction that belonged to either of them, and also had some powers which belonged to neither of those courts."

Ex Parte Bakelite Corporation (279 U. S. 438).

The Comptroller General relied upon the decision in the *Bakelite* case to support his ruling that the courts of the District of Columbia are legislative and not constitutional courts and that the justices thereof are, therefore, subject to a reduction in pay under the Economy Act. The language he relies upon will be found at the top of page 449:

> "While Article III of the Constitution declares, in Section 1, that the judicial power of the United States shall be vested in one Supreme Court and in 'such inferior courts as the Congress may from time to time ordain and establish,' and prescribes, in Section 2, that this power shall extend to cases and controversies of certain enumerated classes, it long has been settled that Article III does not express the full authority of Congress to create courts, and that other Articles invest Congress with powers in the exertion of which it may create inferior courts and clothe them with functions deemed essential or helpful in carrying those powers into execution. But there is a difference between the two classes of courts. Those established under the specific power given in Section 2 of Article III are called constitutional courts. They share in the exercise of the judicial power

defined in that section, can be invested with no other jurisdiction, and have judges who hold office during good behavior, with no power in Congress to provide otherwise. On the other hand, those created by Congress in the exertion of other powers are called legislative courts. Their functions always are directed to the execution of one or more of such powers and are prescribed by Congress independently of Section 2 of Article III; and their judges hold for such term as Congress prescribes, whether it be a fixed period of years or during good behavior.

"The first pronouncement on the subject by this Court was in *American Insurance Co.* v. *Canter*, 1 Pet. 511, where the status and jurisdiction of courts created by Congress for the Territory of Florida were drawn in question. Chief Justice Marshall, speaking for the court, said, p. 546:

" 'These courts, then, are not constitutional courts, in which the judicial power conferred by the Constitution on the general government can be deposited. They are incapable of receiving it. They are legislative courts, created in virtue of the general right of sovereignty which exists in the government, or in virtue of that clause which enables Congress to make all needful rules and regulations respecting the territory belonging to the United States. The jurisdiction with which they are invested is not a part of that judicial power which is defined in the third article of the Constitution, but is conferred by Congress, in the execution of those general powers which that body possesses over the territories of the United States.'

"That ruling has been accepted and applied from that time to the present in cases relating to territorial courts.

> "A like view has been taken of the status and jurisdiction of the courts provided by Congress for the District of Columbia. These courts, this Court has held, are created in virtue of the power of Congress 'to exercise exclusive legislation' over the district made the seat of the government of the United States, are legislative rather than constitutional courts, and may be clothed with the authority and charged with the duty of giving advisory decisions in proceedings which are not cases or controversies within the meaning of Article III, but are merely in aid of legislative or executive action, and therefore outside the admissible jurisdiction of courts established under that Article."

The only question before the court in the *Bakelite* case was the status of the Court of Customs Appeal, and while reference is made to the territorial courts and the courts of the District of Columbia by way of analogy, the opinion itself does not assert that the courts of the District of Columbia were established *exclusively* under the legislative power of Congress over the District of Columbia, but simply indicates that in so far as they were established under that power they were legislative courts and clothed with authority and charged with the duty of giving decisions in proceedings which are not cases or controversies within the meaning of Article III but are merely in aid of legislative or executive action and, therefore, outside the admissible jurisdiction of courts established under Article III.

There is certainly no prohibition in the Constitution against the creation of courts with legislative and ad-

ministrative duties or with both legislative and constitutional duties, and if the Constitution had included a different article or section under Article III in which it had said "Congress may confer on Federal courts administrative and legislative jurisdiction where necessary to carry out the powers granted," of course, it would not be argued that this jurisdiction could not be conferred on the Federal courts generally. There being no prohibition in the Constitution, Congress has the right to give to the District of Columbia courts the judicial power under Article III and to give them the administrative functions under Article I; in other words, Congress could exercise its dual powers of a national legislature and of a State legislature in granting jurisdiction to our local court.

McAllister v. *United States* (141 U. S. 174).

This case is frequently referred to as placing the courts of the District of Columbia upon a parity with the territorial courts. As Mr. Justice Harlan plainly shows in his opinion, the court was there considering the status of temporary tribunals which would be superseded when the territories became States of the Union (Op. 188). His opinion gave rise to a strong dissent by Mr. Justice Field which was concurred in by Mr. Justice Gray and Mr. Justice Brown (hereinafter quoted).

In *Cross* v. *United States* (145 U. S. 571), decided shortly after the *McAllister* case, Chief Justice Fuller distinguished these temporary tribunals from the per-

manent courts of the District of Columbia in the following language:

> "It is contended on behalf of the government that the writ of error will not lie because the Supreme Court of the District of Columbia is not a court of the United States, within the intent and meaning of the section (Sec. 6 of the Act of Feb. 6, 1889, 25 Stat. 655). *McAllister* v. *United States*, 141 U. S. 174, is cited with the decisions referred to therein, as sustaining that view; but it is to be remembered that that case referred to territorial courts only; * * *" (p. 576).

Pitts v. Peak (50 F. (2d) 485)

In the opinion of the Court of Appeals in *Pitts* v. *Peak*, Mr. Justice Groner traces the jurisdiction of the courts of this district to both the power of exclusive legislation under Section 8, Article I, and to the judicial power under Article III of the constitution. He says (p. 486):

> "The Supreme Court of the District is a court of the United States (Section 43, title 18, D. C. Code 1929), for the administration of the laws of the United States. It is made such by enactment of Congress, and derives its jurisdiction and powers from the same source as, and in this respect is like, all other inferior law courts of the United States, for only the jurisdiction of the Supreme Court is derived directly from the Constitution. Every other court created by the general government derives its jurisdiction wholly from the authority of Congress. *Kline* v. *Burke Const. Co.*, 260 U. S. 226 at page

234, 43 S. Ct. 79, 67 L. Ed. 226, 24 A. L. R. 1077. But Congress in turn derives its powers from the Constitution. It is therefore, we think, not precisely accurate to speak of the Supreme Court of the District as a legislative court, except in like manner as all other inferior courts of the United States are legislative courts, or to liken it to consular courts, or to that class of courts or tribunals created by Congress to perform some function primarily belonging to the Congress but which it may rightfully exercise or delegate, or to territorial courts, of which Chief Justice Marshall said, in *American Ins. Co.* v. *Canter,* 1 Pet. 511, 546, 7 L. Ed. 242, they 'are not constitutional courts, in which the judicial power conferred by the Constitution on the general government, can be deposited. They are incapable of receiving it,' for this is not true of the Supreme Court of the District of Columbia because, as was said by the Supreme Court, speaking of that court, 'We find here a court which by acts of Congress is to be treated as a district court of the United States.' *Federal Trade Commission* v. *Klesner,* 274 U. S. 145, 158, 47 S. Ct. 557, 560, 71 L. Ed. 972, and which, by act of Congress, has had conferred upon it all the power and jurisdiction conferred by Congress upon the district courts under article 3 of the Constitution. That Congress has also conferred upon the Supreme Court of the District, jurisdiction in or powers beyond those designated cases and controversies prescribed by Section 2 of article 3 does not, we think, change the nature or constitution of that court, but grows, rather, out of another constitutional provision found in Section 8 of article 1 granting to Congress power to exercise ex-

clusive legislation in all cases whatsoever over the District of Columbia, which, as the Supreme Court said in *Keller* v. *Potomac Electric Power Co.*, 261 U. S. 428, 442, 43 S. Ct. 445, 67 L. Ed. 731, means 'that as to the District, Congress possesses, not only the power which belongs to it in respect of territory within a state, but the power of the state as well. In other words, it possesses a dual authority over the District, and may clothe the courts of the District, not only with the jurisdiction and powers of Federal courts in the several states, but with such authority as a state may confer on her courts,' and this latter authority, that is to say, the sovereign power of the state, as was held in *Prentis* v. *Atlantic Coast Line Co.*, 211 U. S. 210, 29 S. Ct. 67, 53 L. Ed. 150, may permit legislative and judicial powers to be united in a single hand. But it by no means follows that because Congress has seen fit, by virtue of its authority over the District of Columbia, to confer upon the courts of the District administrative functions, which outside the District it may not confer upon courts created solely under article 3, these courts are any the less created under that article of the Constitution, nor do we know of anything in the history of these courts or in the legislation with relation to them which would indicate the contrary. We think a reasonable and correct view of the subject would indicate that, in the creation and organization of the superior courts of the District of Columbia, Congress has availed of its dual constitutional right in the first place to establish courts of law and invest them, as it has, with power and jurisdiction over all cases and controversies which, under the au-

thority of article 3, it has invested the district courts of the United States, and, in the second place, in the exercise of the power of a sovereign state, under the provisions of section 8 of article 1, has further imposed upon them jurisdiction and power which it cannot impose upon other like courts functioning outside the District. There is no inhibition in the Constitution against the exercise by Congress of this dual power, arising as it does out of an express grant in the one case (article 3) and an implied grant in the other (article 1, sec. 8), nor does its exercise in the one case exhaust its power and prevent its exercise in the other, and therefore we assume, when Congress created the two courts—the district courts of the United States and the Supreme Court of the District of Columbia—and gave to each, within its own sphere, identical jurisdiction, that it drew its power from the same source, even though it was necessary it should have recourse to another provision of the Constitution in order to clothe the courts at the seat of government with other and additional authority not permissible under article 3."

The statement in *Pitts* v. *Peak, supra,* that the Supreme Court of the District of Columbia is not a legislative court except in the sense that it is also a constitutional court, is sustained by reference to that provision of the Constitution in relation to the power of Congress over the District of Columbia, for it is there provided (Article I, Section 8) that Congress shall have the same power over the District of Columbia as it has over forts, dockyards, and other places

purchased by consent of the legislature of the State in which the same shall be. The judicial power thus granted over places acquired by Congress as forts and dockyards is the judicial power under Article III plus the judicial power of the State in which the property is located, and this latter jurisdiction arises out of the cession by the particular State. The United States, therefore, possesses as to such places *a dual power*, and it was this dual power that Chief Justice Taft spoke of in *Keller* v. *Potomac Electric Co.* (261 U. S. at page 443), where, in speaking of the power of Congress over the District of Columbia, he said: "In other words it possesses a dual authority over the District and may clothe the courts of the District not only with the jurisdiction and powers of Federal courts in the several States but with such authority as a State may confer on her courts." But this is not the same power which Congress possesses over the territories, which, unless otherwise provided by treaty, is unrestricted. Congress may therefore clothe the courts of the territories with "like powers" as constitutional courts but without regard to the particular constitutional source from whence these powers arise. And this it has done from time to time. But in the case of the District of Columbia the Constitution attached when it was a part of the State of Maryland, and, as is said in *Downes* v. *Bidwell, supra,* "the mere cession of the District of Columbia to the Federal government relinquished the authority of the States but it did not take it out of the United States or from under the aegis of the Constitution." And hence the constitutional

provision in Article III that the judges of the courts of the United States should be appointed for good behavior and should not be subject to reduction of salary is a safeguard which the inhabitants of all the States of the Union as well as those of the District of Columbia have a right to demand to insure the proper and consistent interpretation and administration of the national laws.

Claiborne-Annapolis Ferry Company v. *The United States* (285 U. S. 382)

The decision in *Pitts* v. *Peak* was cited with approval in the opinion of Mr. Justice McReynolds in the Claiborne-Annapolis Ferry Company case, where he held:

> "It has been suggested that the Supreme Court of the District of Columbia cannot be regarded as a district court, and judges of the Court of Appeals of the District are not circuit judges within those provisions; consequently the District Supreme Court had no jurisdiction to hear the present cause. The point is without merit.
>
> "Section 43, title 18, District of Columbia Code, 1929, provides that the Supreme Court 'shall possess the same powers and exercise the same jurisdiction as the district courts of the United States, and shall be deemed a court of the United States.' *Federal Trade Commission* v. *Klesner*, 274 U. S. 145, 156, 47 S. Ct. 557, 560, 71 L. Ed. 972, held that Section 5 of the Federal Trade Commission Act, conferring jurisdiction on the circuit courts of appeals to enforce, set aside, or modify orders of the commission, should be construed as conferring like

> jurisdiction upon the Court of Appeals of the District of Columbia. 'The parallelism between the Supreme Court of the District and the Court of Appeals of the District, on the one hand, and the district courts of the United States and the circuit courts of appeals, on the other, in the consideration and disposition of cases involving what among the states would be regarded as within Federal jurisdiction, is complete.' And see *Pitts* v. *Peak* (App. D. C.) 50 F. (2d) 485."

The Harvard Law Review for February, 1933, p. 677, contains an instructive article on "The Court of Claims: Judicial Power and Congressional Review," fully reviewing the Bakelite and other decisions in this Court and the status of the courts of the District of Columbia as well as that of the Court of Claims.

II

The Compensation of the Justices of the Supreme Court and Court of Appeals of the District of Columbia Cannot Be Lawfully Diminished.

If the courts of the District of Columbia are inferior courts of the United States exercising the judicial power conferred by Article III of the Constitution, they are entitled to the protection of Section 1 of that Article which guarantees permanency of tenure and stability of compensation.

There is no limitation in this constitutional provision that this guarantee shall be restricted to such inferior courts as may be established wholly for the purpose of exercising judicial power and no decision of this or any other court has been found which holds that in-

ferior courts of the United States exercising legislative and administrative functions as well as judicial powers are not entitled to this constitutional protection. To so hold, would give the Constitution a construction not contemplated by the fathers.

Alexander Hamilton, in the Federalist, No. LXXVIII, clearly pointed out the intentions of the fathers of the Constitution, and in No. LXXIX, said:

> "Next to permanency in office, nothing can contribute more to the independence of the judges, than a fixed provision for their support. The remark made in relation to the President is equally applicable here. In the general course of human nature, *a power over a man's subsistence amounts to a power over his will.* And we can never hope to see realized in practice the complete separation of the judicial from the legislative power, in any system which leaves the former dependent for pecuniary resource on the occasional grants of the latter. The enlightened friends to good government, in every state, have seen cause to lament the want of precise and explicit precautions in the state constitution on this head. Some of these indeed have declared, that permanent salaries should be established for the judges; but the experiment has in some instances shown, that such expressions are not sufficiently definite to preclude legislative evasions. Something still more positive and unequivocal has been evinced to be requisite. The plan of the convention accordingly has provided, that the judges of the United States 'shall at *stated times* receive for their services a compensation, which shall not be *diminished* during their continuance in office.' "

As stated in the dissenting opinion of Mr. Justice Field in the *McAllister* case (141 U. S. at p. 196), and recited in the Declaration of Independence, among the repeated injuries and usurpations of the King of Great Britain, which our fathers declared just ground for separation from the mother country, was that he had "made judges dependent upon his will alone for the tenure of their office and the amount and payment of their salaries," and when the Constitution of the United States was framed, the convention took special care to prevent the possibility of the commission of such a wrong, under the new government to be created, by embodying in that instrument the declaration that "the judges, both of the supreme and inferior courts, shall hold their offices during good behavior, and shall, at stated times, receive for their services a compensation, which shall not be diminished during their continuance in office." Art. III, Sec. 1. "This provision," said Mr. Justice Field, "was only the expression of a principle that had become the established law of all English-speaking people. When the Constitution was under discussion before the country previous to its adoption this article received special attention."

And Chancellor Kent, in his Commentaries, Vol. 1, pages 292-295, after tracing this provision of our Constitution to its English source, says:

> "The provision for the permanent support of the judges is well calculated, in addition to the tenure of their office, to give them the requisite independence. It tends also to secure a succession of learned men on the bench, who, in consequence of a certain undiminished support, are

> enabled and induced to quit the lucrative pursuits of private business for the duties of that important station. The Constitution of the United States, on this subject, was an improvement upon all our previously existing constitutions. By the English act of settlement of 12 and 13 William III, it was declared that the salaries of the judges should be ascertained and established; but by the statute of 1 Geo. III, the salaries of the judges were absolutely secured to them during the continuance of their commissions. The constitution of Massachusetts followed the declaration in the English statute of William, and provided that permanent and honourable salaries should be established by law for the judges; but this was not sufficiently precise and definite to guard against all evasion; and the more certain provision in the Constitution of the United States has been wisely followed, in the subsequent constitutions of most of the individual States."

Marshall's oft quoted words are:

> "I have always thought, from my earliest youth till now, that the greatest scourge an angry Heaven ever inflicted upon an ungrateful and a sinning people was an ignorant, a corrupt, or a *dependent judiciary*" (Debates Va. Conv., 1829-1831, pp. 616, 619).

and Justice Story said:

> "Without this provision (as to an undiminishable compensation), the other, as to the tenure of office, would have been utterly nugatory, and indeed a mere mockery."

Another great authority declared:

> "No one can doubt the perfect authority of Congress to remodel their Courts, or to confer or withdraw their jurisdiction at their pleasure. But the question is, whether they can deprive Judges of the tenure of their office and their salaries after they have once become constitutionally vested in them."
>
> 3 Tuck. Black. Comm., App. 22 to 25.

See also the learned discussion of the tenure and compensation of the Judiciary in *Story on the Constitution*, Vol. 2, Secs. 1607-1635.

In most of the plans proposed in the constitutional convention, there was a prohibition against increase as well as diminution of the compensation of the judiciary.

> Elliott's Debates (1st ed.), Vol. 1, pages 144-176-182.

But the prohibition against increase was rejected and Mr. Madison admitted:

> "I wished myself to insert a restraint on the augmentation as well as the diminution of their compensation and supported it in the convention; but I was overruled."
>
> Supra, Vol. III, p. 537.

In order to make more effective this constitutional provision for the protection of the Justices of this Court and of all courts of the United States inferior thereto, the Congress passed the Retirement Act, now Section 375 of the United States Code, providing for the compensation of all judges of courts of the United

States appointed to hold office during good behavior who might resign or retire after having served at least ten years continuously and after having attained the age of 70 years. Under this statute, the Justices of this Court must *resign*—other members of the Federal judiciary may resign or retire. The well known purpose of the Retirement Act was to eke out the meagerness of judicial compensation and to offer an inducement to distinguished lawyers to relinquish the greater emoluments of private practice by guaranteeing to them upon the completion of arduous service upon the bench the same compensation they were receiving upon resignation or retirement.

Attorney General Harmon on November 18, 1926 (21 Op. A. G. 449, 451), in passing upon the right of Judge Nott, of the Court of Claims, to avail himself of the provisions of this Retirement Act, said:

> "The object was to further the good of the public service by providing for the retirement at full pay of judges who have reached the age of 70 and been ten years on the bench. The expression 'any judge of any court of the United States' was certainly intended to have a wide application. * * * It is a matter of common knowledge that the object of this statute was not only to offer an additional inducement to enter the judicial service of the United States but also to encourage the retirement therefrom of men whom age or infirmity make incapable of further service, some of whom at the time of the passage of the Act had already been for a considerable time wholly disabled."

And Chief Justice Hughes, in his "Supreme Court of the United States," page 74, says:

> "While Congress could not provide constitutionally for the compulsory retirement of a judge during good behavior by fixing an age limit, Congress could and did provide (1869) for the voluntary retirement *on full pay* at or after the age of 70 years when a judge had held his commission for at least ten years."

The constitutional exemption from diminution of salary followed the office of all members of the Federal judiciary and became a fixed condition of the tenure, irrespective of the constitutional source in which the office originated.

If the Comptroller General's construction of the Economy Act be correct and the Congress thereby intended to reduce the salaries of the Federal judges who had *resigned* but did not intend to diminish the compensation of those who had *retired* because of the Constitutional inhibition, then a trap has been laid for the members of the Federal judiciary who resigned relying upon the promise contained in the statute and the good faith of Congress in enacting it. Congress could not have forced them to retire by fixing an age limit, but, according to the Comptroller General, it could tempt them to resign voluntarily and thereafter reduce the compensation of the resigned justices of this Court 50 per cent, of the various Federal courts of appeal 20 per cent and of the Federal courts of first instance 10 per cent.

As indicating that a broad question of public policy is involved in placing judicial office and compensation beyond the reach of the appointing or legislative power, the very recent case of *Bailey* v. *Waters*, Auditor General (162 Atl. Rep. 819), is instructive. There the Supreme Court of Pennsylvania reviewed the power of the legislature to decrease a judicial salary during the incumbent's continuance in office and held that it could not be done—although the constitution of Pennsylvania of 1790 (Article V, Section 2) which was modeled after the Federal Constitution (Article III, Section 1) provided that compensation of judges "shall not be diminished during their continuance in office" and these words were omitted from the Constitution of 1873. The Court there points out that a similar conclusion was reached in the Chancellor's Case, 1 Bland (Md.) 595, where the legislature of Maryland attempted to reduce the salary of the Chancellor but rescinded its action after considering the memorial presented by him to the legislature.

The argument of Chancellor Bland in the latter case is worthy of careful study. He said, among other things (1 Bland, 671):

> "Commissions during good behavior, and salaries secured during the continuance of those commissions, constitute that strong well marked boundary between the judiciary and the other two departments. Thus founded and sustained, the judges are, and can be—and without it they cannot be—a firm, efficient, co-ordinate check and balance in the Government. It is this independency of character, that enables the judiciary

to shield the citizen against unconstitutional legislation; and against unwarranted wrong and violence from the wealthy and the influential."

* * * * * * *

"This interference with the *duration* of judicial salaries has another obvious and direct tendency, no less hostile to the principles of our constitution. The *appointing power* is lodged, exclusively, with the governor and council. But, if the general assembly can, at pleasure, withhold or reduce a judicial salary, it is evident they may, in that manner, come into direct collision with the *appointing power* of the executive. If the person, appointed to a judicial office, happens to be displeasing to the legislature, his salary may be, at once, withdrawn or reduced so as to force him to resign. And what is most odious, in this kind of collision, is, that this unjustly excited and misguided feeling of the legislative body may be aroused by persons who are not members of it; by persons who are not of either house; but, who have influence and a knack at intrigue. Such malcontents may work upon the honest indolence of members, and urge them on, unthinkingly, to effect the ruin of the best of men, and the most sacred of institutions, merely to gratify some smuggled and vile malignancy, which they dare not have the impudence to exhibit openly before the public."

On many occasions Congress has increased the compensation of the justices of the District of Columbia and other courts of the United States but has never attempted to directly diminish their compensation, and every statute the effect of which might be to reduce the

salaries of Federal judges has been held to be unconstitutional.

In the leading case of *Evans* v. *Gore* (253 U. S. 245), (in which Mr. Justice Van Devanter, who delivered the opinion in the *Bakelite* case, announced the opinion of the court) a tax upon the net income of a United States District Judge assessed under the Act of February 24, 1919, by including his official salary, thus operating to diminish his compensation, was held unconstitutional. The opinion quotes at length from President Washington, Chief Justice Marshall and Alexander Hamilton to show that this immunity from diminution of compensation written into the Constitution

> "was not to benefit the judges, but, like the clause in respect of tenure, to attract good and competent men to the bench and to promote that independence of action and judgment which is essential to the maintenance of the guaranties, limitations and pervading principles of the Constitution and to the administration of justice without respect to persons and with equal concern for the poor and the rich. Such being its purpose, it is to be construed, not as a private grant, but as a limitation imposed in the public interest; in other words, not restrictively, but in accord with its spirit and the principle on which it proceeds.
>
> * * * * * * *
>
> "The prohibition is general, contains no excepting words and appears to be directed against all diminution, whether for one purpose or another; and the reasons for its adoption, as publicly assigned at the time and commonly

> accepted ever since, make with impelling force for the conclusion that the fathers of the Constitution intended to prohibit diminution by taxation as well as otherwise—that they regarded the independence of the judges as of far greater importance than any revenue that could come from taxing their salaries" (Opinion, pp. 253-255).

In the later case of *Miles* v. *Graham* (268 U. S. 501), the same ruling was applied to a judge of the Court of Claims.

A similar conclusion was reached by Chief Justice Taney in protesting against the construction placed by the Treasury Department upon an Act of Congress in 1863 imposing a tax of three per cent on the salaries of all officers in the employment of the United States so as to embrace judicial officers and salaries of judges. In a letter to Secretary Chase, under date of February 16, 1863, and reported in 157 U. S., Appendix 701, the learned Chief Justice said:

> "I find that the act of Congress of the last session imposing a tax of three per cent on the salaries of all officers in the employment of the United States, has been construed in your department to embrace judicial officers, and the amount of the tax has been deducted from the salaries of the judges.
>
> The first section of the third article of the Constitution provides that 'The judicial power of the United States shall be vested in one Supreme Court, and such inferior courts as Congress may, from time to time, ordain and establish. The judges of both the Supreme and Inferior Courts shall hold their offices during good

behavior, and shall at stated times receive for their services a compensation which shall not be diminished during their continuance in office.'

The act in question, as you interpret it, diminishes the compensation of every judge three per cent, and if it can be diminished to that extent by the name of a tax, it may in the same way be reduced from time to time at the pleasure of the legislature.

The Judiciary is one of the three great departments of the government, created and established by the Constitution. Its duties and powers are specifically set forth, and are of a character that requires it to be perfectly independent of the two other departments, and in order to place it beyond the reach and above even the suspicion of any such influence, the power to reduce their compensation is expressly withheld from Congress, and excepted from their powers of legislation.

Language could not be more plain than that used in the Constitution. It is moreover one of its most important and essential provisions. For the articles which limit the powers of the legislative and executive branches of the government, and those which provide safeguards for the protection of the citizen in his person and property, would be of little value without a judiciary to uphold and maintain them, which was free from every influence, direct or indirect, that might by possibility in times of political excitement warp their judgments.

Upon these grounds I regard an act of Congress retaining in the Treasury a portion of the compensation of the judges, as unconstitutional and void; and I should not have troubled

> you with this letter, if there was any mode by which the question could be decided in a judicial proceeding."

It is in the same spirit as impelled this remonstrance by Chief Justice Taney that the judges of the Supreme Court and of the Court of Appeals have instituted this action. The monetary loss by reason of the diminution of their salaries is of little consequence compared with the surrender by them of the independence of the respective tribunals of which they are judges. They have never been unwilling to assume a fair share of their burden as citizens in a time of great national distress, but on the other hand they regard it as their duty not to acquiesce in a ruling which would forever displace the courts of which they are members from the independent position which those courts have occupied without question from the time of their establishment.

There is distinguished precedent for the remonstrance of Chief Justice Taney, for as far back as 1788, George Wythe, John Blair, and Edmund Pendleton, three of the great lawyers of that period and then members of the Supreme Court of Appeals of Virginia, united in a "respectful remonstrance" to the legislature of that State against a statute effecting a reduction of their compensation and imposing upon them as well duties in other courts. (*4 Call (Va.) 135.*) The Virginia constitution then provided as to the appointment of judges: "The two houses of assembly shall by joint ballot, appoint judges of the supreme court of appeals, and general court, judges in chancery, judges of admiralty, secretary, and the at-

torney general, to be commissioned by the governour, and continue in office during good behaviour." There was, however, not then a constitutional prohibition against diminution of salary. These great judges, after stating their regret that they were impelled to make the remonstrance "at a time when the minds of the citizens are agitated upon other questions of great and national concern," nevertheless declared that "finding themselves called by their country to sustain an important post as one of the three pillars on which the great fabric of government was erected," their duty required them to declare their opposition to the act. In the remonstrance they said, "No free government, or the blessing of liberty can be preserved to any people but (among other things) by frequent recurrence to fundamental principles;" and then they state this fundamental principle as follows: "The propriety and necessity of the independence of the judges is evident in reason and the nature of their office; since they are to decide between government and the people, as well as between contending citizens; and, if they be dependent on either, corrupt influence may be apprehended, sacrificing the innocent to popular prejudice; and subjecting the poor to oppression and persecution by the rich. And this applies more forcibly, to exclude a dependence on the legislature; a branch, of whom, in cases of impeachment, is itself a party." And again: "For vain would be the precautions of the founders of our government to secure liberty, if the legislature, though restrained from changing the tenure of judicial offices, are at liberty to compel a resignation by reducing salaries to a copper,

or by making it a part of the official duty to become hewers of wood, and drawers of water." The remonstrance resulted in a change of the statute of Virginia at the next session of the General Assembly.

Evans v. *Gore* and *Miles* v. *Graham*, *supra*, were decided upon the broad proposition that the purpose of Article III, Section 1, of the Constitution was to attract good and competent men to the bench and to promote that independence of action and judgment which is essential to the maintenance of the guaranties, limitations and pervading principles of the Constitution and to the administration of justice without respect to persons and with equal concern for the poor and for the rich; that such purpose was not to be construed as a private grant but as a limitation imposed in the public interest; that the prohibition is general, contains no excepting words and appears to be directed against all diminution. No suggestion is to be found in these cases that this Court was making any narrow distinction between tribunals created under the judicial power, the legislative power, or both. The interpretation given to the Bakelite decision by the Comptroller General would have the effect of overruling *Evans* v. *Gore* and *Miles* v. *Graham*. The broad principles announced in these cases cannot be destroyed by the dictum in the *Bakelite* case and the subsequent decision of this Court in *Claiborne-Annapolis Ferry Company* v. *The United States* (285 U. S. 382, *supra*), may be taken as an indication that the Comptroller General is giving the *Bakelite* decision an interpretation that was never in the contemplation of the learned Justice who wrote it.

In *James* v. *United States* (202 U. S. at pp. 407-8), *supra*, Mr. Justice White said:

> "The words of the statute 'when any judge of any court of the United States resigns his office,' are broad enough to embrace all courts created by the United States, *without taking into view the particular constitutional authority which was exercised in such creation.* * * * We do not deem it necessary to determine whether the Supreme Court of the District of Columbia is an inferior court within the meaning of Sec. 1 of Article 3 of the Constitution, since, even if it be not a court of that character, it is nevertheless a court of the United States within the meaning of Rev. Stat. Sec. 714."

To hold that the compensation of the justices of the courts of the District of Columbia may be diminished, directly or indirectly, by the Economy Act or any similar statute would make these courts subservient to the will and caprice of Congress, would destroy the separation of powers made by the Constitution and make Congress supreme, because the body that controls the subsistence of layman or jurist can influence his actions and decisions.

No courts in the United States are closer to the administrative and legislative branches of the Government than the courts of this District and none are more susceptible to the influence which inevitably flows from personal contacts.

The courts of the District of Columbia are not only the guardians of the lives, liberties and property of the residents of the District of Columbia, but of all offi-

cers of the Government stationed here, while it is to these courts that the citizens of the Nation must resort for assertion of their rights against alleged disregard or invasion by officers and commissions of the general Government, as, in many cases, it is here alone that jurisdiction can be obtained. There are no courts in the land whose independence is more important to the American people than these courts, nor any which stand more in need of the constitutional protection against the possibility of encroachment by executive and legislative influence and authority. As they are wholly and peculiarly within the spirit and purpose of the constitutional provision, they must be within its protection. *Ratio legis, est anima legis.*

It is respectfully submitted that the first questions certified should be answered in the affirmative and the second in the negative.

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